Supreme Court, U.S.
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No. 88-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In a declaratory action between two excess insurers to determine their relative responsibilities under preprinted form contracts in light of stipulated facts, did the Second Circuit err in relying upon Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985), to hold that the district court's construction of the policies, as to whose making no extrinsic evidence was offered, presented a question of fact subject only to the "clearly erroneous" review of Federal Rule of Civil Procedure 52(a) ?

2. Did Anderson v. City of Bessemer City, 470 U.S. 564 (1985), overrule Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242, 255 (1890), which held that interpretation of written contracts, unaided by extrinsic evidence or oral testimony about their making, presents a "question of law" ?[1]

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[1]The caption in this court contains the names of all the parties in the Second Circuit.

STATEMENT OF INTERESTED PARTIES

United States Fire Insurance Company is a wholly-owned subsidiary of Crum & Forster, Inc. It has no subsidiaries. Crum & Forster, Inc. is a subsidiary of Xerox Financial Services, Inc., which in turn is a wholly-owned subsidiary of Xerox Corporation.

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OPINIONS BELOW

The order and opinion of the United States Court of Appeals for the Second Circuit is officially reported at 858 F. 2d 882 (2d Cir. 1988). The order and opinion of the United States District Court for the Southern District of New York is officially reported at 670 F. Supp. 1191 (S.D.N.Y. 1987). A supplemental order and opinion of the Southern District, 24 November 1987, dealing with a question of prejudgment interest not involved in this petition, is not officially reported and is not reproduced here. The order of 14 November 1988 by the Second Circuit, denying petitioner's prayer for rehearing or hearing en banc (A32), is not officially reported.

JURISDICTION OF THIS COURT

The order of the United States Court of Appeals for the Second Circuit sought to be

reviewed here was entered 30 September 1988. Petitioner timely filed a petition for rehearing or hearing en banc on 14 October 1988. That was denied by order entered on 14 November 1988 (A32). No extension of time to file this petition for writ of certiorari was sought. Petitioner seeks a writ of certiorari from this Court pursuant to 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 52(a) provides:

> Rule 52. Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence,

> shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This action was instituted by petitioner, United States Fire Insurance Company ["US Fire"] against respondent, Federal Insurance Company ["Federal"], Aetna Casualty & Surety Company ["Aetna"], and their mutual insureds, Michael F. Bell and John Boyle Bell, to recover $866,345 which US Fire had paid on behalf of Michael Bell for a 1981 auto accident under its "Commercial Comprehensive Catastrophe Liability Policy" ["the Catastrophe Policy"]. In brief, US Fire

claimed that Aetna's "Personal Auto Policy" and Federal's "Personal Excess Liability Policy" ["the Excess Policy"] applied before its Catastrophe Policy and it should therefore be indemnified; alternatively, it claimed that the policies were concurrent, and the other insurers should therefore contribute to the settlement. The action was removed to the Southern District of New York on the basis of diversity of citizenship and amount in controversy. After a bench trial in the district court on the issue of the reasonableness of the settlement, on which US Fire prevailed, Aetna paid its policy limits to US Fire ($500,000), and was released by both US Fire and Federal. The district court then ruled that the Excess Policy and the Catastrophe Policy insured at the same level, and ordered ratable contribution by Federal to US Fire. In a subsequent unreported order it denied US Fire prejudgment interest.

Both sides appealed to the Second Circuit, US Fire contending that the Catastrophe Policy

applied only after exhaustion of the Excess Policy, hence it should be granted full, not partial, indemnity, and that the court erred in denying it prejudgment interest. Federal urged that the Excess Policy applied after the Catastrophe Policy, hence it owed nothing[2].

Petitioner notes briefly here the argument in the Second Circuit to the extent necessary to clarify the Rule 52(a) issue, since the construction of the insurance policies, whether fact or law, is not reviewable here. US Fire urged principally that the district court erred in failing to give effect to precise words in the Excess Policy that "it comes into play after all your primary liability insurance has been used up" (A27-28; 670 F. Supp. 1197), because the

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[2]Federal relied chiefly on the disparity in premium between the policies in both the district court (A30; 670 F. Supp. at 1198) and the Second Circuit (A9; 858 F. 2d at 886-87), to urge that the Excess Policy was final-tier coverage. Since the premium amount is stated on the declaration sheets of the policies showing their coverage, it is not evidence "extrinsic" to the policies to which it is attached.

policy's provision should be construed against the insurer, e.g., Northbrook Excess & Surplus Ins. Co. v. Chubb Group, 67 N.Y. 2D 1015, 503 N.Y.S. 2d 317, 494 N.E. 2d 448 (1986), and it referred to the Excess Policy's Appeals clause, Ultimate Net Loss clause, Payment of Loss clause, and Insolvency clause, which referred only to "primary" insurance as coming before it, to urge that the Excess Policy applied after all primary, but not excess, coverages. In contrast, US Fire noted that its own "Underlying Insurance" clause referred to "excess insurance of another carrier" as coming before it. As to the admitted identity of the two policies' "other insurance" clauses, it urged that under New York law the "other insurance" clauses did not change the ranking between two excess covers, but only applied to excess covers of the same rank, citing e.g., Allstate Ins. Co. v. Farmers Ins. Group, 67 N.Y. 2d 924, 502 N.Y.S. 2d 135, 493 N.E. 2d 238 (1986), modifying 108 A.D. 2d 284, 488 N.Y.S. 2d 703 (1st Dep't 1985).

The Second Circuit found it unnecessary to precisely address these arguments, holding that:

> We note that although the events and the language of the pertinent insurance policies were stipulated in the district court, the proper inferences to be drawn from the language remained in dispute. Accordingly, the trial court's factual findings may not be overturned unless they are clearly erroneous. Anderson v. City of Bessemer City, 470 U.S. 564, 574-75, 105 S. Ct. 1504, 1511-12, 84 L. Ed. 2d 518 (1985); Apex Oil Co. v. Vanguard Oil & Service Co., Inc., 760 F. 2d 417 (2d Cir. 1985). Under that standard of review we conclude that the district court's findings that (1) both policies purported to be available only after other insurance was exhausted, and (2) neither policy expressly limited its liability to amounts in excess of amounts collectible under other excess policies, were not clearly erroneous, and we affirm the ruling that U.S. Fire and Federal must contribute ratably to so much of the settlement as was not paid by the primary insurers.

858 F. 2d at 884; A5.

ARGUMENT

SUMMARY

Whether the interpretation of fully integrated contracts in light of stipulated facts and unaided by extrinsic evidence of their making is a question of fact or a question of law has

ramifications in three areas of civil procedure: First, whether a given matter should be decided by a judge or sent to a jury; second, whether the scope of appellate review is plenary, or limited to the "clearly erroneous" review of Rule 52(a), and third, whether a given decision has stare decisis effect. The holding below, that the disagreement between the insurers over the interpretation of two printed industry-standard form contracts presented a question of fact was assuredly not the holding of Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985), and although the holding below is supported by post-Anderson opinions from the First Circuit and arguably from the Tenth, it is squarely contradicted by post-Anderson holdings from the District of Columbia, Third, Fifth, Sixth, Eighth and 11th Circuits, and pre-Anderson opinions of this Court which it has not overruled.

THE QUESTIONS PRESENTED ARE IMPORTANT

As Judge Newman noted in his extensive concurring opinion in Antilles Steamship Co., Ltd., v. American Hull Ins. Syndicate, 733 F. 2d 195, 202-07 (2d Cir. 1984), "[the fact/law distinction in contract interpretation] has relevance for determining whether the issue is to be decided by the trial judge or, when available, the jury, whether the determination, if made by the trial judge, is subject upon appellate review to the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure, and whether the construction is to have stare decisis effect" (footnote omitted).

Stare decisis, or lack thereof, is important here because "we should deem it in the public interest in contract cases to have as much certainty as possible as to the meaning of contracts, especially those involving terms used by others beyond the contracting parties. * * * It is of special importance to do so in the instant

case involving a standard form of contract for marine insurance, the uniform interpretation of which is significant for the entire shipping industry." Antilles Steamship Co., supra, 735 F.2d at 207. This case is a paradigm of a "standard form of contract" "the uniform interpretation of which is significant" for an entire industry. The Catastrophe Policy sub judice has been the subject of at least 11 reported opinions[3] and the Excess Policy has been the

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[3]United States Fire Ins. Co. v. Charter Financial Group, 851 F. 2d 957 (7th Cir. 1988); Mission Ins. Co. v. United States Fire Ins. Co., 401 Mass. 492, 517 N.E. 2d 463 (1988); United States Fire Ins. Co. v. Capital Ford Truck Sales, Inc., 257 Ga. 77, 355 S.E. 2d 428 (1987), reversing Capitol Ford Truck Sales, Inc. v. United States Fire Ins. Co., 180 Ga. App. 413, 349 S.E. 2d 201 (1986); Allstate Ins. Co. v. Farmers Ins. Group, 108 A.D. 2d 284, 488 N.Y.S. 2d 703 (1st Dep't 1985), modified, 67 N.Y. 2d 924, 502 N.Y.S. 2d 135,493 N.E. 2d 238 (1986); Prince Carpentry, Inc. v. Cosmopolitan Mut. Ins. Co., 124 Misc. 2d 919, 479 N.Y.S. 2d 284 (Sup. Ct. N.Y. Cty. 1984); United States Fire. Ins. Co. v. Maryland Cas. Co., 52 Md. App. 269, 447 A. 2d 896 (1982); United States Fire Ins. Co. v. National Union Fire Ins. Co., 107 Cal. App. 3d 456, 165 Cal. Rptr. 726 (1980); Johnson v. Milgo Industrial, Inc., 458 F. Supp. 297 (D. Minn. 1978), aff'd, Johnson v. United States Fire Ins.

subject of at least 14 others[4]. The insurers need to know how a court will construe their policies, not how a fact-finder could construe them. "Boilerplate provisions are * * * not the consequence of the relationship of particular [contracting parties] and do not depend upon

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Co., 586 F. 2d 1291 (8th Cir. 1978)

[4]Leek v. Reliance Ins. Co., 486 So. 2d 701 (Fl. App. 1986); Walker v. Fireman's Fund Ins. Co., 66 Md. App. 687, 505 A. 2d 884, cert. den., 306 Md. 514, 510 A. 2d 260 (1986); Kenyon v. Newton, 115 A.D. 2d 291, 496 N.Y.S. 2d 136 (4th Dep't 1985); Federal Ins. Co. v. Allstate Ins. Co., 111 A.D. 2d 146, 488 N.Y.S. 2d 780 (2d Dep't 1985); Atkinson v. Atkinson, 254 Ga. 70, 326 S.E. 2d 206 (1985); Frankenmuth Mut. Ins. Co. v. Kompus, 135 Mich. App. 667, 354 N.W. 2d 303 (1984); Farlow v. Vigilant Ins. Co., 165 Ga. App. 696, 302 S. E. 2d 578 (1983); Ladas v. Aetna Ins. Co. 416 So. 2d 21 (Fl. App. 1982), rev. den., 429 So. 2d 6 (1983); Mackin v. Applestein, 404 So. 2d 789 (Fl. App. 1981); Federal Ins. Co. v. Applestein, 377 So. 2d 229 (Fl. App. 1979); Hartford Acc. & Ind. Co. v. Kellman, 375 So. 2d 26 (Fl. App. 1979); Shapiro v. Glens Falls Ins. Co., 39 N.Y. 2d 204, 383 N.Y.S. 2d 263, 347 N.E. 2d 624 (1976), affirming, 47 A.D. 2d 856, 365 N.Y.S. 2d 892 (2d Dep't 1975); Aetna Ins. Co. v. State Automobile Mut. Ins. Co., 368 F. Supp. 1278 (W.D. Ky. 1973)

particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact." Sharon Steel Corp. v. Chase Manhattan Bank, 691 F. 2d 1039, 1048 (2d Cir. 1982), cert. den., 460 U.S. 1012 (1983). The questions presented are further important because the division between law and fact is also the division between judge and jury. E.g., Capital Blue Cross v. Paid Prescriptions, Inc., 496 F. Supp. 223, 227 (M.D. Pa. 1980)(relying on Hamilton v. Liverpool & London & Globe Ins. Co., supra, 136 U.S. 242, 255 (1890), to take case from the jury). If the Second Circuit is correct that the contest between the parties here over the correct construction of the two policies was a question of fact, it necessarily follows that a (properly instructed) jury should (or could, if a timely jury demand had been made) resolve whether the Excess's Policy's

statement that it applied "after all your primary liability insurance has been used up" (670 F. Supp. at 1197; A27-28) was a binding admission of coverage level under the rule of contra proferentem, or whether it should be disregarded because the "precise coverage responsibilities are more elaborately and technically set forth in the `Policy' section". Id. Whether that argument is resolved in favor of or against US Fire, it should be resolved the same way in all cases, and thus is a question of law and not a "fact" capable of relitigation every time it arises.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The relevant precedent was not Anderson v. City of Bessemer City, 470 U.S. 564 (1985), which held that a trial court's finding of "intent" to discriminate was a finding of fact subject only to clearly erroneous review, even

when founded upon a record which was largely documentary, but Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242, 255 (1890), where this Court heldthat "[u]pon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree * * * on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law to be decided by the court." See generally, Rankin v. Fidelity Ins. & Safe Deposit Co., 189 U.S. 242, 252-53 (1903)("Although the construction of written instruments is one for the court[,] where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury"), citing, William & James Brown Co. v.

M'Gran, 14 Pet. [39 U.S.] 479, 493 (1840)(Story, J.)("It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the Court, and not to the jury. But there certainly are cases, in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties"). Hamilton, supra, 136 U.S. 242, 255, which has not been overruled, remains binding authority on the federal courts.

THE CIRCUITS ARE DIVIDED

Following Anderson v. City of Bessemer City, 470 U.S. 564 (1985), the circuits are in disagreement about whether a dispute about the effect to be given to the words of wholly written contracts is a question of fact or of

law[5]. The First Circuit appears to agree with the Second that the disagreement about the effect of the language in written contracts is a question of fact. RCI Northeast Services Division v. Boston Edison Co., 822 F. 2d 199, 202, 203 (1st Cir. 1987):

> "[W]here the plain meaning of a contract phrase does not spring unambiguously from the page or from the context, its proper direction becomes one for the factfinder, who must ferret out the intent of the parties" [citation omitted]). * * *
> "An argument between parties about the meaning of a contract is typically an argument about a material fact, namely the factual meaning of the contract" [citation]. * * * Accordingly Rule 52(a) applies with undiminished energy to this matter" [quotation omitted].

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[5]US Fire does not suggest that this was clearly settled before Anderson v. City of Bessemer City, supra. Compare, e.g., Meyers v. Selznick Co., 373 F. 2d 218, 225 (2d Cir. 1966)(Friendly, J.)("[t]he books are indeed studded with statements that `[t]he construction of all written instruments belongs to the court.' 9 Wigmore, Evidence, 2556 at 522 (3d ed. 1940); 4 Williston, Contracts 616 at 649 (3d ed. 1961)"), with Dobson v. Masonite Corp., 359 F. 2d 921, 923 (5th Cir. 1966)("[i]nterpretation is always a question of fact").

Cf. North River Ins. Co. v. Cy Thompson Transportation Agency, Inc., 840 F. 2d 139, 141 (1st Cir. 1988)(where extrinsic evidence relied upon, a question of fact is presented).

The position of the 10th Circuit at least appears to be consistent with the First and Second Circuits. Republic Resources Corporation v. ISI Petroleum West Caddo Drilling Program 1981, 836 F. 2d 462, 465 (10th Cir. 1987)("the contract is ambiguous as to whether paragraphs one and three were intended to be independent of paragraphs two and four. This is a question of law [citation omitted]. But the interpretation of the ambiguous contract is a question of fact, id., which an appellate court may not make").

In contrast, the DC Circuit takes the position that the (disputed) construction of a purely written instrument (a release) is a matter of law, not fact. Hershon v. Gibraltar Building & Loan Ass'n, Inc., ___ F. 2d ___, 1989 WL 476, 5 (D.C. Cir. 6 Jan. 1989)("the question of interpreting the plain language of a contract is a

question of law . . . and appellate courts are not limited to the clearly erroneous standard of review unless extrinsic evidence was [properly] utilized" [quotation omitted; brackets in original]); the Third Circuit, post Anderson, squarely disagrees with the holding below in the Second Circuit. Pacific Indemnity Co. v. Linn, 766 F. 2d 754, 760 (3rd Cir. 1985):

> "Most of the issues raised in these appeals involve the interpretation of insurance contracts. Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law [citation omitted]. Therefore, our review is plenary [citation omitted]. Similarly, whether an insurance policy is ambiguous is a legal question over which our review is plenary [citations omitted]. Our review of factual disputes is governed by the clearly erroneous standard".

See STV Engineers, Inc. v. Greiner Engineering, Inc., 861 F. 2d 784, 787 (3d Cir. 1988)("[t]o the extent * * * that the district judge's decision involves the construction of a clear contractual term, or the application of that construction to the facts of the case, our re-

view is plenary"). The Fifth Circuit, in one of the most complete post-Anderson analysis of the fact/law dichotomy in contract interpretation, squarely rejects the position below that a disagreement about the effect the language of written documents is a fact question. Godchaux v. Conveying Techniques, Inc., 846 F. 2d 306, 314 n. 17 (5th Cir. 1988):

> Ordinarily courts attempt to resolve ambiguities in a contract by looking to the contract itself, on the theory that the parties' words best represent their intentions. Ambiguous terms are interpreted in light of other terms in the contract, and the inconsistencies are resolved through standard rules of interpretation - - for example, that specific terms control over general terms, or that separately negotiated terms control over standardized terms. As long as the contract as a whole is coherent, ambiguities can be resolved as a matter of law, without looking beyond the four corners of the document. In such cases, a reviewing court is not bound by the clearly erroneous standard of review. Since no issues of fact are involved, the reviewing court is as competent as the trial court to interpret the contract. . . .
> In some cases, however, even by looking at the entire document, ambiguities cannot be resolved -- the document as a whole is ambiguous. To resolve these

> ambiguities, a court cannot rely solely on the language of the contract to interpret the parties' intent, and must look to extrinsic or parol evidence. Consequently, in these cases, questions of contract interpretation are questions of fact, . . . and the clearly erroneous standard of review applies. Fed. R. Civ. P. 52(a).

quoting, Carpenter's Amended & Restated Health Ben. Fund v. Holleman Constr. Co., Inc., 751 F. 2d 763, 766-67 (5th Cir. 1985); see Tejas Drilling Co. v. Del International, Inc., 849 F. 2d 176, 179 (5th Cir. 1988)("[t]hese conclusions, which construe the legal effect of the contractual language, are legal conclusions subject to de novo review" [citation omitted]); Dow Chemical Co. v. M/V Roberta Tabor, 815 F. 2d 1037, 1041 (5th Cir. 1987)("[q]uestions of contract interpretation are questions of law subject to de novo review"); Southern Natural Gas Co. v. Pursue Energy, 781 F. 2d 1079, 1081 (5th Cir. 1986)("the district court's determination of non-ambiguity is a question of law which we review de novo").

The Sixth Circuit in two different opinions,

substantially agrees with the Fifth Circuit's approach in Godchaux v. Conveying Techniques, Inc., 846 F. 2d 306, 314 n. 17 (5th Cir. 1988), supra, that Fed. R. Civ. P. 52(a) does not apply to a trial court's conclusions about the meaning of written instruments. Lancaster Glass Corp. v. Phillips ECG, Inc., 835 F. 2d 652, 658 (6th Cir. 1987):

> "Fed. R. Civ. P. 52(a) provides that findings of fact by the district court shall not be set aside unless they are clearly erroneous. When reviewing the district court's interpretation of a contract, however, an appellate court is not limited by the "clearly erroneous" rule [citation omitted]. The interpretation and construction of a written contract, as required here, are matters of law, thus allowing de novo review [citation omitted]. Such de novo review permits us to draw our own inferences and legal conclusions from the record in the present case . . . ."

Similarly, Weimer v. Kurz-Kasch, Inc., 773 F. 2d 669, 671 (6th Cir. 1985), clearly supported US Fire's prayer for de novo review:

> We agree with the district court's conclusion that the only issue presented is one of contract interpretation, but we are unable to concur in the district court's conclusion, based on its interpretation of the collective bargaining agreements, that Kurz-Kasch is entitled to judgment. Contract interpretation, such as is involved here, is a question of law not subject to the clearly erroneous standard; thus in reviewing the district court's interpretation of the pertinent contracts, we are not bound by Fed. R. Civ. P. 52(a) [citation omitted]. The trial court's conclusions of law are freely reviewable by the court of appeals [citation omitted]. In interpreting these collective bargaining agreements, we reach a contrary conclusion . . . .

The 8th and 11th Circuits in post-Anderson decisions have taken positions contrary to the First and Second, holding that a trial court's resolution of the meaning of a written contract without relying on extrinsic evidence of intent presents a question of law subject to de novo review. Ford v. First Municipal Leasing Corp., 838 F. 2d 994, 996 (8th Cir. 1988)(Nebraska

law)[6]; Arkansas Rice Growers Coop. Assoc. v. Alchemy Indus., Inc., 797 F. 2d 565, 567 (8th Cir. 1986)("[i]t is well settled that the construction and legal effect of a contract are questions of law subject to de novo review [citation]. To the effect that the meaning of the contract depends on disputed extrinsic evidence, however, it constitutes a finding of fact [citation], subject to review on appeal under the clearly erroneous rule, Fed. R. Civ. P. 52(a)"); Stevenson v. Stevenson Assoc., 777 F. 2d 415, 418 (8th Cir. 1985)("where an adjudication of parties' rights and obligations under a contract

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[6]US Fire agrees with the Second Circuit, however, that even in a diversity case, the line between fact and law is a matter of federal law. Hershon v. Gibraltar Building & Loan Ass'n, Inc., ___ F. 2d ___, 1989 WL 476, 5 (DC Cir. 6 Jan. 1989), so holds, and it follows from this Court's decisions in Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), and Herron v. Southern Pac. Co., 283 U.S. 91 (1931), that the line between judge and jury is a matter of federal law in all instances. The same result obtains if one views the issue as the application vel non of Rule 52(a). Hanna v. Plumer, 380 U.S. 460 (1965).

rests solely upon a reading of the contract itself, and involves no findings of fact or questions of credibility, we review the district court's conclusions of law free of the clearly erroneous standard of Fed. R. Civ. P. 52(a)); Eatmon v. Bristol Steel & Iron Works, Inc., 769 F. 2d 1503, 1518 (11th Cir. 1985)("[o]ur review of the district court's interpretation of the executive order conciliation agreement is not restricted by the clearly erroneous rule of Fed. R. Civ. P. 52(a)"); Paradise v. Prescott, 767 F. 2d 1514, 1525 (11th Cir. 1985)("[a]ppellate review of a district court's construction of a consent decree is akin to review of a district court's contract interpretation; in this aspect of the case, we thus are not bound by either the clearly erroneous rule or the abuse of discretion standard" [citation omitted]), aff'd on other grounds sub nom. United States v. Paradise, 480 U.S. 149 (1987); Farm Stores, Inc. v. Texaco, Inc., 763 F. 2d 1335, 1340 (11th Cir.) ("the clearly erroneous standard does not apply

to legal conclusions or mixed questions of law and fact" [citations omitted]), cert. dism'd, 474 U.S. 1039 (1985). This is also apparently the position of the Ninth Circuit as well. Hawaiian Telephone Co. v. Microform Data Systems, Inc., 829 F. 2d 919, 921 (9th Cir. 1987)("[w]e review de novo the district court's interpretation of contractual provisions [citation omitted]. We review the district court's factual findings for clear error. Fed. R. Civ. P. 52(a)").

The issue therefore arises frequently, has wide ramifications for civil procedure, has divided the circuits, and the holding below conflicts with a square precedent of this Court.

CONCLUSION

A Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

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APPENDIX

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff-Appellant, Cross-Appellee,

v.

FEDERAL INSURANCE COMPANY, Aetna Insurance Company, John Boyle Bell and Michael Bell,

Defendants.

Appeal of FEDERAL INSURANCE COMPANY,

Defendant-Appellee, Cross-Appellant.

Nos. 1140, 1224, Dockets 88-7087, 88-7131.

United States Court of Appeals,
Second Circuit.

Argued May 6, 1988.

Decided Sept. 30, 1988.

Catastrophe insurer brought action against excess insurer to recover money contributed to settlement of underlying personal injury action brought against insured of both companies. The United States District Court for the Southern District of New York, Bernard Newman, Senior Judge, sitting by designation, 670 F.Supp. 1191, entered judgment in favor of catastrophe insurer. Appeal and cross appeal were taken. The Court of Appeals, Kearse, Circuit Judge, held that: (1) District Court findings that exhaustion provisions of catastrophe policy and excess policy cancelled each other out and each insurer thus had to contribute to settlement in proportion to respective policiy limits were not clearly erroneous, and (2) catastrophe insurer was entitled to recover prejudgment interest.

Affirmed in part, reversed in part and remanded.

Michael F. Close, Keene Valley, N.Y. (Barry, McTiernan & Moore, New York City, on the brief), for plaintiff-appellant-cross-appellee.

Brian F. McDonough, New York City (William G. Becker, Jr., Shanley & Fisher, P.C., New York City, on the brief), for defendant-appellee-cross-appellant.

Before LUMBARD, OAKES, and KEARSE, Circuit Judges.

KEARSE, Circuit Judge:

Plaintiff United States Fire Insurance Co. ("U.S. Fire") appeals from a final judgment entered in the United States District Court for the Southern District of New York following a bench trial before Bernard Newman, *Judge*,* awarding U.S. Fire $61,057.50 as reimbursement from defendant Federal Insurance Co. ("Federal") for one-sixth of an amount paid by U.S. Fire in settlement of a personal injury suit against their common insured, 670 F.Supp. 1191 (S.D.N.Y.1987). On appeal U.S. Fire contends (1) that Federal should have been required to reimburse it for the entire amount of its settlement payments, and (2) that U.S. Fire was entitled to prejudgment interest. Federal cross-appeals, contending that it is not liable to U.S. Fire for any portion of the settlement. We affirm so much of the judgment as awarded U.S. Fire $61,057.50 and reverse so much of the judgment as denied it prejudgment interest on that amount.

I. BACKGROUND

The following facts are not in dispute. In 1981, Michael Bell ("Bell"), the parties' common insured, was involved in an automobile accident. Bell was driving a car owned by John Boyle & Co. ("Boyle"), of which his father was president. A passenger in the car suffered personal injuries in the accident and brought an action for damages against Bell and Boyle. That action triggered disputes over the proper allocation of liability among the

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* The Honorable Bernard Newman, Senior Judge of the United States Court of International Trade, sitting by designation.

insurers who had issued four insurance policies, each of which covered Bell at the time of the accident: (1) a primary insurance policy issued by Federal to Boyle (the "business auto policy") in the amount of $500,000; (2) a primary insurance policy issued by Aetna Casualty & Surety Co. ("Aetna") to Bell's mother (the "personal auto policy"), also in the amount of $500,000; (3) a "Personal Excess Liability Policy" issued by Federal to Bell's father (the "excess policy") in the amount of $2,000,000; and (4) a "Commercial Comprehensive Catastrophe Liability Policy" issued by U.S. Fire to Boyle (the "catastrophe policy") in the amount of $10,000,000. As discussed in greater detail in part II.A. below, both Federal's excess policy and U.S. Fire's catastrophe policy contained provisions stating that the policy's coverage did not come into play until the insured had exhausted other available sources of insurance (the "exhaustion provisions").

The personal injury suit was settled for $1,366,345. Of this amount, Federal paid $500,000 under its business auto policy but nothing under its excess policy, and Aetna eventually contributed $500,000 under the personal auto policy. At issue on this appeal is the remaining $366,345, paid by U.S. Fire under its catastrophe policy. U.S. Fire commenced the present action against Federal in state court, from which it was removed to the district court.

To the extent pertinent here, U.S. Fire contended that its catastrophe policy was excess to both (a) the primary insurance policies and (b) Federal's excess policy, and that U.S. Fire was entitled to recover the entire $366,345 from Federal. Federal, on the other hand, contended that its excess policy was excess to both (a) the primary policies and (b) U.S. Fire's catastrophe policy, and that Federal was not liable for any part of the $366,345.

After a bench trial on stipulated facts, the district court held that U.S. Fire was entitled to recover one-sixth of the $366,345 from Federal. In an Opinion, Findings of Fact and Conclusions of Law dated October 7, 1987, the court found that since both U.S. Fire's catastrophe policy and Federal's excess policy purported to provide coverage only after all other available

insurance had been exhausted, the two exhaustion provisions canceled each other out, and both U.S. Fire and Federal must contribute to the $366,345 portion of the settlement in proportion to their respective policy limits. Since the limits of the pertinent U.S. Fire and Federal policies were, respectively, $10,000,000 and $2,000,000, the court concluded that the ratio of their liability was 5 to 1 and ordered Federal to reimburse U.S. Fire for one-sixth of the $366,345 paid by U.S. Fire, or $61,057.50.

In a Memorandum dated November 24, 1987 ("Memorandum") the court rejected U.S. Fire's request for prejudgment interest on the ground that N.Y.Civ.Prac.L. & R. ("CPLR") § 5001(a) (McKinney 1963) allows an award of such interest only when the court has found a breach of contract. The court's rationale for concluding that U.S. Fire's action was not grounded in contract was as follows:

> The New York Court of Appeals has often noted that there is a fundamental distinction between contribution and indemnity. *See, e.g., McDermott v. City of New York*, 50 N.Y.2d 211, 428 N.Y.S.2d 643, 406 N.E.2d 460 (1980); .... The right to contribution is not founded on, nor does it arise from, contract. It exists where ratable or proportional reimbursement is sought. Conversely, the right to indemnity springs from an express or implied contract in situations where full, not partial, reimbursement is sought....
>
> In the underlying matter, a ratable distribution of insurance proceeds was ordered. Consequently, the parties' insurance action was founded upon the right of contribution and not indemnification.

Memorandum at 3-4 (other citations omitted).

These appeals followed.

II. DISCUSSION

On its appeal, U.S. Fire urges principally that we review the insurance policies de novo and find that its catastrophe policy applied only after exhaustion of Federal's excess policy. Federal argues that the "clearly erroneous" standard of review set forth in Fed.R.Civ.P. 52(a) applies and that the district court erred in not inferring, from a disparity in the premiums charged for the two policies, that Federal's excess policy applied only after exhaustion of U.S. Fire's policy.

We note that though the events and the language of the pertinent insurance policies were stipulated in the district court, the proper inferences to be drawn from the language remained in dispute. Accordingly, the trial court's factual findings may not be overturned unless they are clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985); *Apex Oil Co. v. Vanguard Oil & Service Co.*, 760 F.2d 417 (2d Cir.1985). Under that standard of review, we conclude that the district court's findings that (1) both policies purported to be available only after other insurance was exhausted, and (2) neither policy expressly limited its liability to amounts in excess of amounts collectible under other excess policies, were not clearly erroneous, and we affirm the ruling that U.S. Fire and Federal must contribute ratably to so much of the settlement as was not paid by the primary insurers.

U.S. Fire also contends that it is entitled to prejudgment interest and that it should be awarded such interest on the entire amount that it paid in the settlement. To the extent that U.S. Fire seeks to recover from Federal interest on any sum greater than the sum awarded to it from Federal, its claim is frivolous. To the extent that U.S. Fire seeks prejudgment interest on the amount Federal is required to contribute, however, its argument has merit and we therefore reverse so much of the judgment as denied such interest.

A. *Liability*

The general rule under New York law is that "[t]here is [a] well-settled equitable right to contribution, where there is

concurrent insurance even in the absence of a policy provision for apportionment," *Travelers Insurance Co. v. General Accident, Fire & Life Assurance Corp.*, 28 N.Y.2d 458, 463, 322 N.Y.S.2d 704, 706-07, 271 N.E.2d 542, 544-45 (1971), and that where each of the policies covering the risk "generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its limit amount of insurance. . . ." *Lumbermens Mutual Casualty Co. v. Allstate Insurance Co.*, 51 N.Y.2d 651, 655, 435 N.Y.S.2d 953, 955, 417 N.E.2d 66, 68 (1980) ("*Lumbermens*"); *accord State Farm Fire & Casualty Co. v. LiMauro*, 65 N.Y.2d 369, 373-74, 492 N.Y.S.2d 534, 538, 482 N.E.2d 13, 17 (1985) ("*State Farm*"). Thus, though it is possible for an insurer to provide "that it would, in effect, supply only the final tier of coverage," if other policies similarly purported to provide final-tier coverage, all such insurers would be required "to contribute ratably" toward any settlement. *Lumbermens*, 51 N.Y.2d at 656 n. *, 435 N.Y.S.2d at 956 n. *, 417 N.E.2d at 68 n. *. The general rule of ratable contributions is inapplicable, however, if it "would effectively deny and clearly distort the plain meaning of the terms of the policies." *Id.* at 655, 435 N.Y.S.2d at 955, 417 N.E.2d at 68.

The *Lumbermens* court determined that the general rule did not apply to three policies at issue before it because the plain language of each demonstrated that the respective parties to each insurance "contract did not bargain for a ratable contribution with any of the [other] policies." *Id.* at 656, 435 N.Y.S.2d at 955, 417 N.E.2d at 68; *see id.* at 655, 435 N.Y.S.2d at 955, 417 N.E.2d at 68. Rather, the court concluded that three tiers of coverage had been agreed to on the basis that (1) the first policy merely stated generally that it was excess to other available sources of insurance; (2) the second "was designed specifically to provide coverage in excess of that provided by [the first]," *id.*; (3) a clause in the second policy stating that the issuer "would not contribute with other collectible insurance 'other than insurance applying as excess to [its] limit of liability,' " *id.* at 656 n. *, 435 N.Y.S.2d at 955 n. *, 417 N.E.2d at 68 n. * (quoting policy), essentially "conceded the possibility that another policy could provide coverage in excess of its coverage," *id.* at 656, 435 N.Y.S.2d at

955, 417 N.E.2d at 68 (footnote omitted); and (4) the third policy "specifically provided coverage in excess of all other coverage available, including excess coverage," and the premiums for this policy "[p]resumably" reflected the agreement that it represented the final tier of coverage and would seldom be reached, *id.*

As to the last factor mentioned in *Lumbermens*, premium size may be an important factor in determining priority of coverage, *see State Farm*, 65 N.Y.2d at 378, 492 N.Y.S.2d at 541, 482 N.E.2d at 20 (declining to order ratable contribution in part because one policy provided $1,000,000 of coverage for a premium of $144 while the other provided only $100,000 to $300,000 of coverage for a premium of $119); but the analysis must consider whether premium disparity instead reflects disparities in the degree of risk covered, *see Northbrook Excess and Surplus Insurance Co. v. Chubb Group*, 113 A.D.2d 319, 325, 496 N.Y.S.2d 430, 433 (1st Dep't 1985) ("In evaluating the significance of the amount of the premium, it is clearly important to measure that premium against the [comprehensiveness of the] coverage provided by that policy."), *aff'd mem.*, 67 N.Y.2d 1015, 503 N.Y.S.2d 317, 494 N.E.2d 448 (1986).

[1] In the present case, the district court concluded that the general rule of ratable contribution applied, finding that neither the U.S. Fire catastrophe policy nor the Federal excess policy manifested a sufficiently clear intent that it would provide a higher tier of coverage than the other. Given the language of each policy's exhaustion provisions, this finding can hardly be termed clearly erroneous. First, each policy uses substantively indistinguishable terms to define its "retained limit," *i.e.*, the amount of other insurance that must be exhausted before the policy comes into play. The U.S. Fire policy defines this amount, in pertinent part, as:

> the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the insured
>
> . . . .

The Federal excess policy defines its retained limit as:

> the limit of liability of the primary insurance as it is shown in the Schedule hereof, or the actual limits of liability of any applicable primary or other insurance, whichever is greater . . . .

Each policy thus evinces the same broad general intent that its coverage is to be excess to all other coverage, as U.S. Fire refers to exhaustion of "underlying" policies and "any other insurance," while Federal refers to exhaustion of "primary" insurance and "other insurance"; but neither policy defines these terms in a way that plainly renders one broader than the other.

Further, the policies' "Other Insurance" clauses suggest that the two policies should be regarded as providing the same tier of coverage. The "Other Insurance" clause in U.S. Fire's policy states:

> If other collectible insurance including other insurance with this company is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of and not contribute with, such other insurance.

The parallel clause in Federal's policy states:

> The insurance provided by this policy shall be in excess of, and shall not contribute with, any other insurance (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) available to the named insured . . ., not only under any policy enumerated in the Schedule, but also under any other insurance available to the insured, and this insurance shall not apply until all such insurance is exhausted.

Both of these clauses refer broadly to exhaustion of "other . . . available" insurance. Neither policy explicitly states, as did the third policy in *Lumbermens*, that it is excess to other "excess"

insurance. Rather each is similar to the second policy at issue in *Lumbermens*, in that the two clauses contain an identically worded exception to the insurer's nonobligation to "contribute with" other insurance, that exception being for "insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder." The *Lumbermens* court characterized such a provision as one that "conceded the possibility that another policy could provide coverage in excess of its coverage." 51 N.Y.2d at 656, 435 N.Y.S.2d at 955; 417 N.E.2d at 68. Since each policy at issue here contains the same concession, and excepts other excess insurance from the category of insurance with which it is not obligated to contribute, the language of the two policies reveals no discernible difference with respect to their intended rank in the hierarchy of applicable insurance.

In sum, each of the two policies states generally that it is to be excess to "other" insurance, yet neither states specifically that it is to be excess to excess insurance, and each in effect concedes that a tier more remote may be provided. The district court's finding that the exhaustion provisions of the two policies offset each other is not clearly erroneous.

Federal argues that the disparate costs of the two policies should have led the district court to find that its policy, costing $144 annually for $2,000,000 of coverage, was intended to provide more remote coverage than that of U.S. Fire, which cost $7,500 for $10,000,000 of coverage. The court noted, however, that

> U.S. Fire insured three corporations and provided for a variety of coverage including, *inter alia*, workmen's compensation, comprehensive general liability, advertising liability and products liability. The Federal excess policy covered two residential properties, one automobile and three licensed drivers.

The court found that the premium disparity reflected not different layers of coverage but rather significant differences in the number and types of risks covered. This finding is not clearly erroneous.

We conclude that the district court's findings that the two policies provided coverage at the same level may not be overturned, and we affirm the ruling that the two insurers are therefore required to contribute in proportion to their respective limit amounts of insurance.

B. *Prejudgment Interest*

[2] The availability of prejudgment interest is governed by CPLR §§ 5001 and 5002 (McKinney 1963). The former deals with interest for the period prior to a jury verdict or the court's decision of the case; the latter deals with interest from the date of the verdict or decision to the date of judgment.

Section 5002 provides, in pertinent part, that "[i]nterest shall be recovered upon the total sum awarded, including interest to . . . decision, in any action, from the date the . . . decision was made to the date of entry of final judgment." There seems to be little question that the district court in the present case should have ordered Federal to pay U.S. Fire interest on the $61,057.50 for the postdecision-prejudgment period.

With respect to the predecision period, CPLR § 5001(a) provides for interest, in pertinent part, as follows:

> Interest shall be covered upon a sum awarded because of a breach of performance of a contract, . . . except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

The district court's denial of U.S. Fire's request for prejudgment interest under this section was apparently premised on its view that because there was no actual contract to which both U.S. Fire and Federal were parties, and because the court awarded U.S. Fire only partial reimbursement, U.S. Fire's claim against Federal should be treated as one for contribution among tortfeasors rather than one grounded in contract. We reject this analysis.

In the context of "apportionment of liability among joint tortfeasors," *McDermott v. City of New York*, 50 N.Y.2d 211, 216, 428 N.Y.S.2d 643, 645, 406 N.E.2d 460, 461 (1980) ("*McDermott*"), it is indeed established (a) that "[t]he right to contribution is not founded on nor does it arise from contract," and (b) that the term "indemnity," which is based on contract, express or implied, is used to describe only "full, not partial, reimbursement," *id.*, 428 N.Y.S.2d at 646, 406 N.E.2d at 462.

Nonetheless, in the context of apportionment of liability among coinsurers, the term "contribution" is used as the equivalent of partial indemnification, and the existence vel non of that right depends on the rights reflected in the insurnace contracts. Thus, a right of partial indemnification is implied by the court in order to avoid allowing one insurer a windfall in light of the existing insurance contracts. In *Aetna Casualtay & Surety Co. v. Merchants Mutual Insurance Co.*, 78 A.D.2d 176, 435 N.Y.S.2d 125 (3d Dep't 1980) ("*Aetna Casualty*"), for example, the appellate court reversed the dismissal of a suit brought to compel the defendant insurer to contribute to the cost of a settlement, ruling that the terms of the policy issued by the defendant gave the plaintiff insurer a cause of action based on a theory of "implied indemnification":

> We hold that a cause of action based on a theory of implied indemnification exists in favor of the plaintiff against the defendant by virtue of the specific provisions of the policy of insurance issued by the defendant on the trailer. . . . [Both policies] insure the driver and both insurers must contribute to a judgment based on the negligence of the driver.

Id. at 178, 435 N.Y.S.2d at 127. Similarly, the analysis in *Lumbermens*, discussed in part II.A. above, and other court of appeals cases makes plain that an insurer's right to contribution does have its origin in contract, to wit, the contracts between the insured and the various insurers. *See* 51 N.Y.2d at 655, 435 N.Y.S.2d at 955, 417 N.E.2d at 68 ("The parties to this contract [*i.e.*, the second-tier policy] did not bargain for ratable contributions"); *id.* at 656, 435 N.Y.S.2d at 955, 417 N.E.2d at

68 ("the parties to the Lumbermens contract [*i.e.*, the third-tier policy] did not bargain for a ratable contribution with any of the [other] policies"); *see also Federal Insurance Co. v. Atlantic National Insurance Co.*, 25 N.Y.2d 71, 77 302 N.Y.S.2d 769, 773, 250 N.E.2d 193, 195 (1969) (the court "must give effect to the parties' private law as reflected in their binding contractual arrangement"); *id.* at 78-79, 302 N.Y.S.2d at 774, 250 N.E.2d at 196 ("[a]s both policies assumed the same risk, both were obligated to defend [the insured] in a suit brought against him and both must contribute, pro rata, toward payment of the cost of the settlement and legal fees and other expenses of the litigation"); *Continental Casualty Co. v. Equitable Life Assurance Society of the United States*, 52 N.Y.2d 228, 233-35, 437 N.Y.S.2d 279, 282, 418 N.E.2d 1298, 1301 (1981) (ratio of required contributions is measured by coinsurers' respective insurance contracts).

[3] In the insurance context, therefore, where the insurance contracts reveal multiple coverage, the court exercises its equity powers to imply a contract between the coinsurers to contribute, and the proportion of their required contribution is grounded in the policy limits set forth in the contract of each insurer with the insured. Accordingly, we reject the district court's premise that U.S. Fire's claim against Federal was analogous to a claim for contribution between tortfeasors as to which predecision interest was barred.

[4] Our conclusion that predecision interest was not barred, however, does not necessarily mean that U.S. Fire was entitled to it as a matter of law. Although § 5001(a) requires an award of such interest as of right if a plaintiff receives his award "because of a breach of performance of a contract," it commits the matter of such interest to the discretion of the court when the "action [is] of an equitable nature." Although we have found no state cases directly in point, and although the implication of an insurer's right to contribution is an exercise of the court's equity powers, several factors persuade us that an insurer's contribution action should be viewed as a type of contract action in which the successful plaintiff is entitled to predecision interest as a matter of right.

First, though the recognition of a coinsurer's right of contribution, or partial indemnification, is an exercise of the court's equity powers, the contribution suit is nonetheless a quasi-contract action, which is an action at law. Thus, the *Aetna Casualty* court, in recognizing a right of contribution, stated,

> "[c]onceptually, implied indemnification finds its roots in the principles of equity. It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity' (Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs,"

78 A.D.2d at 178, 435 N.Y.S.2d at 127 (quoting *McDermott*, 50 N.Y.2d at 216-17, 428 N.Y.S.2d at 646, 406 N.E.2d at 462); and the *McDermott* court noted that the vehicle through which the court remedies unjust enrichment is quasi contract. *McDermott* went on to observe that "quasi contract was a form adopted by common-law courts to incorporate the equitable principles of unjust enrichment. Thus, although remedies such as indemnity are derived from equitable notions, the action is and has been *an action at law*." 50 N.Y.2d at 217 n. 2, 428 N.Y.S.2d at 646 n. 2, 406 N.E.2d at 462 n. 2 (emphasis added).

Second, § 5001(a)'s phrase "because of a breach of performance of a contract" appears to be sufficiently broad to encompass an insurer's recovery of contribution for two reasons. To begin with, such a recovery requires (a) the existence of a contract between the defendant and the insured and (b) nonpayment by the defendant to the insured of a sum called for by that contract. The defendant's nonpayment may easily be construed as a breach of performance of that contract, "because of" which the coinsurer is entitled to contribution. In addition, since the court implies the existence of a partial indemnification

agreement between the coinsurers, the recovering insurer may be said to have recovered because of a breach of the implied contract. At least one New York court has recognized that a plaintiff who recovers for breach of a contract implied by the court is entitled to interest as of right under § 500(a). *See Isaacs v. Incentive Systems, Inc.*, 52 A.D.2d 550, 551, 382 N.Y.S. 2d 69, 70-71 (1st Dep't 1976)("The sum awarded below being 'because of a breach of performance of a contract,' albeit a contract implied in law, plaintiff was properly awarded interest on the recovery. (CPLR 5001.)").

Third, the history of § 5001(a) supports the conclusion that a plaintiff who recovers under an implied contract was meant to recover predecision interest as a matter of law. Section 5001(a)'s predecessor, § 480 of the New York Civil Practice Act ("CPA"), provided in pertinent part as follows:

> In every action wherein any sum of money shall be awarded by . . . decision upon a cause of action for the enforcement of or based upon breach of performance of a *contract, express or implied*, interest shall be recovered upon the principal sum.

(Emphasis added.) Cases construing this provision tended "to include contracts implied in law and quasi-contracts under the general heading of implied contracts." 5 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice*, ¶ 5001.04, at 50-13 (1987); *see, e.g., Employers' Liability Assurance Corp. v. Empire City Iron Works, Inc.*, 19 Misc.2d 963, 965, 187 N.Y.S.2d 425, 429 (Sup.Ct. Queens Co. 1959)("Under [CPA § 480], it matters not whether the contract arises by operation of law or by express agreement between the parties. Interest follows as a matter of course in either situation.") The Advisory Committee's note to the original draft of § 5001(a) stated that the new language of § 5001(a) was intended only as a simplification, not as a change. *See* 5 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 5001.04, at 50-12.

For all of these reasons, we conclude that U.S. Fire was entitled as a matter of law to predecision interest from Federal on the $61,057.50 awarded. Such interest should be computed from the date on which U.S. Fire made the settlement payment. As noted above, U.S. Fire was also entitled to interest from the date of decision to the date of entry of the judgment "upon the total sum awarded, including interest to . . . decision." CPLR § 5002.

We reverse so much of the judgment below as denied U.S. Fire prejudgment interest, and we remand for the calculation of such interest in accordance with the foregoing and for the entry of a new judgment that includes the award of such interest.

CONCLUSION

The judgment of the district court is affirmed in part and reversed in part, and the matter is remanded for further proceedings in accordance with this opinion. Each party shall bear its own costs on these appeals.

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff,

FEDERAL INSURANCE COMPANY, Aetna Casualty & Surety Company, John S. Bell, Jr. and Michael Bell,

Defendants.

No. 85 Civ. 2014 (BN).

United States District Court,
S.D. New York.

Oct. 7, 1987.

Excess insurer brought action against other insurers to recover money contributed to settlement of underlying personal injury action brought against insured of both companies. The District Court, Newman, Senior Judge, sitting by designation, held that: (1) there was no difference in specificity between two insuring agreements and neither were in excess to the other, and thus, each insurer was required to contribute pro rata in ratio of policy limits, and (2) prevailing insurer was entitled to interest accruing subsequent to date of entry of final judgment.

Ordered accordingly.

Barry, McTiernan & Moore, New York City by Michael F. Close, for plaintiff U.S. Fire Ins. Co.

Shanley & Fisher, P.C., New York City by Robert M. Leonard, for defendants Federal Ins. Co., John S. Bell, Jr. and Michael Bell.

Leahey & Johnson, New York City by Edward Bosek, for defendant Aetna Cas. & Sur. Co.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

NEWMAN, Senior Judge, United States Court of International Trade, sitting as a District Court Judge, by designation:

United States Fire Insurance Company ("U.S. Fire") commenced this action against two other insurers to recover the sum of $866,345 U.S. Fire contributed to the settlement of an underlying personal injury action brought against an insured of all three companies, resulting from an automobile accident more fully described *infra*.

Initially, plaintiff named as defendants Federal Insurance Company ("Federal"), John Bell,[1] and his son Michael. Thereafter, an amended summons and complaint were served to include Aetna Casualty & Surety Company ("Aetna") as a defendant.[2] In due course, trial was had to the court. Diversity jurisdiction is predicated on Title 28 U.S.C. § 1332.

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[1] This defendant, alternately titled "John S. Bell, Jr." (summons and complaint), "John B. Bell, Jr." (joint pre-trial order), and "John Fitzhugh Bell" (tr. at 9), will hereinafter be referred to as "John Bell".

[2] U.S. Fire is a New York corporation; Federal is a Connecticut corporation; John and Michael Bell, at the relevant time, were residents of Connecticut; and Aetna is a Connecticut corporation. Although named in this action, the Bells have been effectively removed from this litigation, which in essence, has proceeded against Federal and Aetna only.

Subsequent to trial and after negotiations, defendant Aetna agreed to contribute its primary policy limit amount —$500,000— in full settlement of all claims against it by Federal and U.S. Fire. Accordingly, this action is dismissed as to Aetna and the opinion herein discusses plaintiff's claims solely against Federal.

BACKGROUND

It has been stipuated that on August 24, 1981 Michael Bell, residing at 548 North Street, Greenwich, Connecticut, his lifelong domicile, was driving a 1979 Buick station wagon accompanied by a friend, David Spencer— a grandson of John D. Rockefeller, III. Spencer (the front seat passenger) and Bell (the driver) were the only two occupants of the vehicle which was owned by John Boyle & Company, Inc. ("the Boyle Company")[3] and which was regularly furnished to Michael Bell for his use.

Bell and Spencer had just departed the Rockefeller Estate in Pocantico Hills, Westchester County, New York and were driving approximately one-half mile away when their auto left the roadway and collided with a tree, in a single vehicle accident. Spencer, then 19, suffered severe injuries including, *inter alia*, a comminuted, compound fracture of the right leg with dislocation and complete disruption of the knee joint, and a comminuted fracture of the right wrist and hand. Spencer's leg injury eventuated in an amputation above the knee.

Thereafter, Spencer commenced a personal injury action in New York Supreme Court against Michael Bell and the Boyle Company— the operator and owner of the accident vehicle, respectively. The defense for both defendants was provided by Federal, the primary insurer of the Boyle Company vehicle. Ultimately, the lawsuit was settled in November 1984 for $1,366,345. Of that amount, Federal paid $500,000 under its Boyle Copany primary policy and U.S. Fire paid the remaining $866,345 pursuant to its catastrophe policy, also issued to the Boyle Company. *See infra* at 1193-94.

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[3] The record indicates that John Bell was president of the Boyle Company.

In the instant litigation, whereas Aetna contended that the amount of the Spencer settlement was unreasonably high, both U.S. Fire and Federal argued the converse, *viz.*, that it was justifiably proper, particularly in view of David Spencer's youth (19); his projected additional life expectancy (approximately 52 years); the severity of his injuries (briefly described *supra*); and his socioeconomic standing (a Rockefeller family member).

At the close of trial, plaintiff moved for partial judgment on such issue of reasonableness and upon due consideration, its application was granted from the bench wherein the court determined that the Spencer personal injury settlement was reasonable.[4] Consequently and subsequent to trial, Aetna agreed to contribute its policy limit of $500,000 in full settlement of the respective claims against it.[5]

At the time of the Bell/Spencer automobile accident, the following relevant insurance policies were in effect:

1. A $500,000 business automobile policy issued by Federal to the Boyle Company.

2. A $500,000 personal underlying automobile policy issued by Aetna to Mary Bell (Michael's mother) insuring a 1979 BMW, which vehicle was not involved in the accident.

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[4] It should be noted that Aetna, like Federal, called no witnesses during the entire trial and chose instead to rely solely on its cross-examination of plaintiff's witness on this issue. In point of fact, Daniel R. Miller, a senior claims specialist at Crum & Forster (an insurance group of which plaintiff was part) was the only witness called to testify at trial. After observing his demeanor and evaluating his testimony, the court finds Miller to be highly credible.

[5] The court also notes that a second issue concerning Aetna was raised at trial, *viz.*, whether Aetna's disclaimer of coverage under its primary personal automobile policy based on an exclusion therein was timely and effective. Aetna argued that Connecticut law should be applied, and that thereunder, its disclaimer was valid. U.S. Fire and Federal countered that New York law should govern, and accordingly, Aetna's disclaimer would then be rendered untimely. Since Aetna tendered the full amount of its policy, the court does not reach this issue. However, it is uncontested that New York law applies to resolve the instant excess liability dispute between U.S. Fire and Federal.

3. A $10,000,000 commercial comprehensive catastrophe liability policy issued to the Boyle Company and two other companies by U.S. Fire.[6]

4. A $2,000,000 personal excess liability policy issued by Federal to John Bell.[7]

Federal assumed the defense of the Spencer lawsuit under its primary business auto policy, which covered the Boyle Company vehicle involved in the accident. As indicated, of the $1,366,345 settlement, Federal paid $500,000 under its primary policy and U.S. Fire contributed the balance of $866,345; after trial, Aetna contributed its primary policy limit of $500,000. Thus, U.S. Fire claims an outstanding amount of $366,345, contending that Federal's $2,000,000 excess liability policy should provide an initial level of excess coverage and should contribute before U.S. Fire's $10,000,000 catastrophe policy. In plaintiff's view, its policy provides coverage only *after* available excess (such as Federal's) and primary insurance has been exhausted. The short of the matter is: plaintiff insists that Federal's excess liability policy is "more specific to the accident, and therefore applies first."

In the alternative, U.S. Fire argues that both its and Federal's excess policies should be applied ratably in the ratio of their respective limit amounts, *viz.*, $10,000,000: $2,000,000, *i.e.*, 10:2.

Conversely, "Federal admits its 'Personal Excess Policy' covers the accident, but contends U.S. Fire's 'Comprehensive Commercial Catastrophe Policy' applies first. Since the latter policy is not exhauted, Federal has no liability." Joint pre-trial order at 7.

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[6] The U.S. Fire catastrophe policy named the Boyle Company and Summit Filter Company, both of Summit, New Jersey, as insured. Two amendments to its declarations page listed an additional address in Manhattan for the Boyle Company and included another insured: Fibre Taxis, Inc. Further, $5,000,000 of this $10,000,000 coverage was provided by the Home Insurance Company, but for purposes of this case, U.S. Fire and Home have been treated ass a single entity.

[7] All references herein to "the Federal policy" concern this excess liability policy and not the underlying Federal primary policy, unless otherwise indicated.

For the reasons set forth *infra*, the court finds the U.S. Fire and Federal excess insurance policies to be indistinguishable for purposes of determining which should be deemed "more excess". Critical provisions and certain phraseology of plaintiff's catastrophe and defendant's excess liability policies are highly comparable and the subject insurance contracts operate to cancel each other out. Hence, the court applies the general rule and holds that the parties must contribute *pro rata* based on their respective limit amounts. Since U.S. Fire has paid the outstanding $366,345 to Spencer, Federal shall pay to plaintiff one-sixth (1/6) thereof, *viz.*, $61,057.50 (representing Federal's proportionate share), plus costs.

DISCUSSION

A.

A discussion of the instant controversy necessarily commences with a review and comparison of pertinent provisions of both insurance contracts in question.

THE U.S. FIRE POLICY

Plaintiff's policy is entitled "Commercial Comprehensive Catastrophe Liability Policy" and its general coverage provision states:

> The Company agrees to pay on behalf of the insured the ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain . . . for:
>
> (a) Personal Injury Liability

Exh. 1 at 1.

More specifically, the policy expressly applies

> with respect to an automobile owned by . . . the named insured, [to] any person using the automobile with the named insured's permission, and any person or organization legally responsible for the use thereof.

Id. at 2.

Clealry, the accident is a covered event, *i.e.*, plaintiff's policy applies as Michael Bell was furnished with the regular use of the Boyle Company vehicle, in which David Spencer was injured.

"Ultimate net loss" is defined as:

> All sums which the insured, or any company as his insurer, or both, is legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury . . . liability to which this policy applies. . . .
>
> This policy shall not apply to defense, investigation, settlement or legal expenses covered by underlying insurance

Id. (boldface in original omitted).

"Underlying Insurance" is defined as follows:

> If underlying insurance is exhausted by any occurrence, the company shall be obligated to assume charge of the settlement or defense of any claim or proceeding against the insured resulting from the same occurrence, but only where this policy applies immediately in excess of such underlying insurance, without the intervention of excess insurance of another carrier.

Id. at 4.

With respect to the "retained limit" of $10,000 above which U.S. Fire will pay the amount of ultimate net loss:

> [T]he company's liability shall be only for the ultimate net loss in excess of . . . the greater of:
>
> (a) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the insured; or

> (b) an amount as stated in Item 4(C) of the declarations as the result of any one occurrence not covered by the said policies or insurance;
>
> and then up to an amount not exceeding the amount as stated in Item 4(A) of the declarations as the result of any one occurrence.

Id. at 3.

Schedule A, appended to the U.S. Fire policy, lists various underlying coverage including $500,000 comprehensive automobile liability coverage. The declarations page dated "12/19/80" under section 4(A) "Limit of Liability" states a coverage amount of $5,000,000 for each occurrence and an additional $5,000,000 aggregate per annum limit "with respect to the products hazard", thereby comprising the subject $10,000,000 policy.

Finally, as to "other insurance":

> If other collectible insurance including other insurance with this company is available to the insured voering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of and not contribute with such other insurance.

Id. at 4.

THE FEDERAL POLICY

Federal issued to John Bell a $2,000,000 "Personal Excess Liability Policy" covering two residential properties, one vehicle and three licensed drivers, and by its terms was stated to be in excess of a combined single limit primary automobile liability policy of $500,000 and an underlying homeowner's insurance policy.

Federal's basic coverage responsibilities comprise:

> A. Personal Liability: The company agrees to pay on behalf of the insured ultimate net loss, in excess of the retained limit, which the insured shall become legally obligated to pay as damages because of personal injury. . . .

Exh. 3 at 6 (boldface in original omitted).

It is undisputed that the Federal policy defines an "insured" to include any relative who resides in the named insured's household. Coverage is applicable because Michael Bell resided in his father's household at the time of the accident and was operating an "owned automobile", *viz.*, the station wagon owned by the Boyle company, which vehicle was furnished for Michael's regular use. *See Id.* at 8-10.

"Ultimate net loss" is

> the sum actually paid or payable in cash in the settlement or satisfaction of loss for which the insured is liable . . . but excludes all loss expenses . . . of the insured, the company or any primary insurer so incurred

Id. at 11 (boldface in original omitted).

> Further, the Federal "retained limit" is the limit of liabilitiy of the primary insurance as it is shown in the Schedule hereof, or the actual limits of liability of any applicable primary or other insurance, whichever is greater. . . .

(*Id.* at 10) and its "other insurance" clause states

> [t]he insurance provided by this policy shall be in excess of, and shall not contribute with, any other insurance (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) available to the named insured

> or any other person or organization falling within the definition of insured in this policy, not only under any policy enumerated in the Schedule, but also under any other insurance available to the insured, and this insurance shall not apply until all such insurance is exhausted.

Id. at 15 (boldface in original omitted).

B.

Establishing a "pecking order"[5] among multiple insurers covering the same risk is an

> anomaly ... [which] arises from the fact that although the insurers contract not with each other but separately with one or more persons insured, each attempts by specific limitation upon the rights of its insured to distance itself further from the obligation to pay than have the others.

State Farm Fire & Casualty Co. v. LiMauro, 65 N.Y.2d 369, 372, 492 N.Y.S.2d 534, 537, 482 N.E.2d 13, 16 (1985).

[1] Despite a variety of resolutions to the problem, in New York, a general rule has emerged that mutual excess policies covering the same risk cancel each other out (*Kansas City Fire and Marine Ins. Co. v. Hartford Ins. Group*, 57 N.Y.2d 920, 456 N.Y.S.2d 760, 442 N.E.2d 1271 (1982); *Federal Ins. Co. v. Atlantic Nat'l Ins. Co.*, 25 N.Y.2d 71, 302 N.Y.S.3d 769, 250 N.E.2d 193 (1969)); and further, each insurer is required to contribute ratably in such proportion as its policy limit bears to the total of all policy limits (*Lumbermens Mut. Casualty Co. v. Allstate Ins. Co.*, 51 N.Y.2d 651, 435 N.Y.S.2d 953, 417 N.E.2d 66 (1980); *State Farm, supra.*)

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[5] "Pecking order" refers to the establishment of a hierarchy or priority of payment.

> This so-called cancelling out rule is
>
> > inapplicable when its use would distort the meaning of the terms of the policies involved. . . . Whether there will be such a distortion turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it . . . as well as upon the wording of its provision cocerning excess insurance.

State Farm, 65 N.Y.2d at 374, 492 N.Y.S.2d at 538, 482 N.E.2d at 17 (citation omitted).

After noting that various courts had adjudicated the issue differently, the New York Court of Appeals in *State Farm* concluded:

> The rule to be distilled from these cases is that an insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies.

Id. at 375-76, 492 N.Y.S.2d at 539, 482 N.E.2d at 18 (citation omitted).

The court in *State Farm* primarily considered, *inter alia*, two policies providing excess coverage: (1) an umbrella policy which insured multiple risks on an excess level but assumed no primary liability as to any of them, and further, explicitly provided that it "shall be in excess of, and shall not contribute with" other collectible insurance available to the insured covering a loss "covered hereunder"; and (2) a primary automobile liability policy which stated that coverage would be rendered "excess" if the injury-causing vehicle was not owned by the insured. The non-owned vehicle clause converted such policy from primary to excess in this instance. *Id.* at 376-77, 492 N.Y.S.2d at 539-40, 482 N.E.2d at 18-19.

The court departed from the general rule of proration and held that the umbrella policy, being a true excess policy, was not required to contribute until the limits of the automobile had been exhausted. Although both policies were found to insure the same risk, "they covered it at different levels", especially in view of the purposes for which the policies were issued: "[one] being essentially primary coverage for a specific automobile with *incidental* excess coverage for a non-owned automobile, [and the other] providing *only* excess coverage for a number of different liability-causing situations." *Id.* at 378, 492 N.Y.S.2d at 541, 482 N.E.2d at 20 (emphasis added).

The present case is patently distinguishable. Here, with respect to basic coverage for personal injury liability, each policy states that payment is forthcoming on behalf of an insured for the ultimate net loss in excess of the retained limit. *See* exh. 1 at 1, exh. 3 at 6. "Ultimate net loss" is, in both instances, defined as the amount paid or payable by the insured pursuant to legal obligation.

[2] Moreover, both insurers contract to pay the amount of ultimate net loss in excess of the "retained limit", which as noted, U.S. Fire defines as the total of the applicable limits of underlying policies listed in Schedule A and the applicable limits of any other insurance collectible by the insured. Exh. 1 at 3. In comparison, Federal is responsible for the limit of primary insurance listed in the policy's appended schedule or the actual limits of any applicable primary or other insurance, whichever is greater. Exh. 3 at 10. Neither company's "schedule" lists the other's excess policy as underlying coverage and the respective wording utilized in the two insurance contracts is essentially duplicative and subject to identical interpretation. Plainly, both companies are attempting to insure at an excess level only, *i.e.*, above primary and other coverage. In summary, upon thorough review of the policies, the court holds that neither is to be given precedence over the other.

Plaintiff highlights a portion of defendant's policy which states that Federal's excess liability responsibilities commence "after all your *primary* liability insurance . . . has been used up" to indicate

that Federal intended to provide a mere initial layer of excess coverage. Manifestly, this language is contained in a general, introductory provision of the Federal insurance contract, within a subsection entitled "Your Policy and You". Exh. 3 at 3-4. Significantly, defendant's precise coverage responsibilities are more elaborately and technically set forth in the "Policy" section (*Id.* at 5-15) which disclose a consistent intention on the part of Federal to contribute policy proceeds only after primary *and* other insurance has been exhausted. Similarly, the U.S. Fire policy contemplates that both primary and excess coverage must be exhausted before its policy is called upon to contribute.

Defendant cites *Lumbermens* (51 N.Y.2d 651, 435 N.Y.S.2d 953, 417 N.E.2d 66) in arguing that under appropriate circumstances, such as here, the general rule of proration should be rejected because it would distort the plain meaning of the policies involved. Federal maintains that its policy is obviously more excess than plaintiff's because it was purchased by John Bell "to provide him with a measure of comfort against large liabilities over and above his several underlying coverages" and as "the final tier in Mr. Bell's insurance plan . . . [since] Mr. Bell did not bargain for coverage that would contribute with other policies, but rather for coverage above and beyond any other available insurance." Deft's brief at 9-10.

In *Lumbermens*, the New York Court of Appeals established a pecking order among four conflicting policies in this manner:

> (1) a primary automobile policy;
>
> (2) a primary policy converted into an excess policy under a non-owned vehicle contingency clause;
>
> (3) an executive (excess) policy; and
>
> (4) a catastrophe (umbrella) policy.

Continuing, *Lumbermens* held the general rule to be inapplicable "because its use would effectively deny and clearly distort the plain meaning of the terms of the policies of

insurance here involved." *Id.* at 655, 435 N.Y.S.2d at 955, 417 N.E.2d at 68. The court determined that the executive policy should contribute before the catastrophe policy, finding that the latter specifically provided coverage in excess of all other coverage available, including excess coverage. Conversely, the court ruled that executive policy was "not just a simple excess policy, but was designed specifically to provide coverage in excess of that provided by [the primary-turned-excess] policy" and would contribute once that underlying policy had been exhausted. *Id.* Although arguably, the *Lumbermens'* executive and catastrophe policies parallel the Federal and U.S. Fire policies, respectively, the current situation is readily distinguishable.

As plaintiff correctly points up, "the two policies contain virtually identical 'other insurance' clauses." Pltf's brief at 5. The U.S. Fire policy expressly states that if other collectible insurance is available to the insured, the U.S. Fire coverage shall be in excess of and not contribute with such other insurance. Exh. 1 at 4. Comparing the analogous Federal provision, it is evident that defendant's insurance is deemed excess to and shall not contribute with any other insurance available to the insured until all such insurance is exhausted. Exh. 3 at 15. Undeniably, both carriers contemplate a disbursement only at the highest (*i.e.* last) level of coverage and have attempted, by way of their similar phraseology, to render their coverage excess to all others. Here too, as to "other insurance", the court finds no significant distinctions between the U.S. Fire and Federal policies.

Importantly, too, the evidence is uncontroverted that neither "other insurance" clause contains language specifically making its carrier, *i.e.* plaintiff or defendant, excess over *all other excess* insurers covering the same risk. In addition, neither U.S. Fire's nor Federal's insurance contract contains language whose plain meaning would be distorted by the application of the general rule requiring proration. As the U.S. Fire and Federal insuring agreements mirror one another in many critical instances, the court cannot deem one "more excess" than the other; rather, *the policies operate to cancel each other out.* Both, therefore, must contribute toward the Spencer settlement at the same level of excess coverage, *i.e.* ratably. *Kansas City Fire and*

Marine Ins. Co. v. Hartford Ins. Group, 57 N.Y.2d 920, 922-23, 456 N.Y.S.2d 760, 761, 442 N.E.2d 1271, 1272 (1982).

C.

[3, 4] An additional consideration often taken into account by the courts has been the premium paid for each policy in that an insurer charging a significantly lower premium for its excess coverage does so to contract for a correspondingly low level of risk, *i.e.*, the lower the premium, the lower the risk to the insurance company, and the higher in the ultimate hierarchy of payment. *See State Farm*, 65 N.Y.2d at 374, 492 N.Y.S.2d at 538, 482 N.E.2d at 17; *Lumbermens*, 51 N.Y.2d at 656-57, 435 N.Y.S.2d at 955-56, 417 N.E.2d at 68-69. In our situation, the U.S. Fire premium for $10,000,000 coverage was $7,500 annually. In contrast, the Federal premium for $2,000,000 coverage was $144 per annum. It was quite correctly pointed out, however, that U.S. Fire insured three corporations and provided for a variety of coverage including, *inter alia*, workmen's compensation, comprehensive general liability, advertising liability and products liability. The Federal excess policy covered two residential properties, one automobile and three licensed drivers. Such different coverage makes premium comparisons irrelevant, and in our case, the wide disparity does not reflect an intention to contract at a different rate of risk, but rather, is the result of the substantial differences in coverage. *Northbrook Excess & Surplus Ins. Co. v. Chubb Group of Ins. Cos.*, 67 N.Y.2d 1015, 503 N.Y.S.2d 317, 494 N.E.2d 448, (1986), *aff'g*, 113 A.D.2d 319, 496 N.Y.S.2d 430 (1st Dep't 1985) (final tier of coverage carried an unusually substantial premium of $1,062,500 for $10,000,000 of insurance).

Finally, even if the U.S. Fire contract could be interpreted as providing somewhat narrower coverage, both insurers are liable because they each provided excess coverage for the loss at issue. Any difference in specificity is insufficient to warrant a finding that one policy should be deemed excess to the other. *See Atlantic Mut. Ins. Co. v. Truck Ins. Exchange*, 797 F.2d 1288 (5th Cir.1986).

CONCLUSION

After a thorough review of the record, including forty-one exhibits, and particularly of course, the two insurance policies at issue, the court finds no substantial differences between these policies concerning critical coverage provisions. There is no difference in specificity between the two insuring agreements. Indeed, their wording is similar in many instances, and in some, virtually identical. Hence, neither can be deemed excess to the other.

Accordingly, the court applies the general rule and orders U.S. Fire and Federal to contribute *pro rata* in the ratio of their policy limits, *i.e.* $10,000,000 (U.S. Fire): $2,000,000 (Federal) or 10:2. U.S. Fire is therefore liable for five-sixths (5/6) of the $366,345 portion of the Spencer settlement while Federal is responsible for one-sixth (1/6), $61,057.50. Defendant Federal is directed to pay to plaintiff the sum of $61,057.50, representing one-sixth of the amount plaintiff seeks, plus costs.

[5] Plaintiff has not sufficiently demonstrated to the court its entitlement to prejudgment interest (*see* N.Y.Civ.Prac.L. & R. § 5001 *et seq.* (McKinney 1963 and Supplementary Pamphlet 1987); *see also, e.g., LaBuda v. New York*, 86 App.Div.2d 692, 446 N.Y.S.2d 534 (3rd Dep't 1982)) nor the proper date from which to begin calculating such amount. Consequently, the parties are to exchange legal memoranda concerning this issue and shall furnish the court with copies within ten (10) days of the date hereof. In any event, the sum due plaintiff shall bear interest *subsequent* to the date of entry of final judgment at the rate prescribed by 28 U.S.C. § 1961. *See G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1542 (11th Cir.1985); *Weitz Co., Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-87 (8th Cir.1983).

The foregoing constitutes the court's findings of fact and conclusions of law in conformance with Rule 52(a), Fed.R.Civ.P.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fourteenth day of November, one thousand nine hundred and Eighty-Eight

DOCKET NUMBER 88-7087
88-7137

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff-Appellant-Cross-Appellee,

V

FEDERAL INSURANCE COMPANY, AETNA INSURANCE COMPANY, JOHN BOYLE BELL and MICHAEL BELL,

Defendants,

V

FEDERAL INSURANCE COMPANY

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant United States Fire Insurance Company.

Upon condieration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: Fred M. Cassidy,
Chief Deputy Clerk

Supreme Court, U.S.
FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF INTERESTED PARTIES

Federal Insurance Company is a subsidiary of the Chubb Group of Insurance Companies, of which Chubb & Co., Inc. is the parent corporation.

STATEMENT OF THE CASE

This is a diversity action in which the courts applied New York law in determining the ranking of two excess insurance policies, both of which purported to be excess to any other insurance available to the insured. In holding that the two insurers should contribute ratably in proportion to the limit of their coverage, the District Court applied the well established rule that "mutual excess policies covering the same risk cancel each other out" [A-25] and that "each insurer is required to contribute ratably in such proportion as its policy limit bears to the total of all policy limits," *id.*, *unless* to do so would "distort the meaning of the terms of the policies involved." [A-26]. This determination is not made in a vacuum, but turns "on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it . . . as well as upon the wording of its provision concerning excess insurance." *Id.*

In concluding that these two policies were intended to contribute ratably, the District Court found that both of them insured the same risk, *i.e.*, the "ultimate net loss" in excess of the "retained limit."* Although each policy contained a schedule of primary or underlying insurance that it was supposed to be excess to, neither listed the other's excess policy as primary or underlying coverage. *Id.* "Plainly," the District Court found, "both companies are attempting to insure at an excess level only, *i.e.*, above primary and other coverage." *Id.*

This was manifested by their "Other Insurance" clauses, each of which provided that they would be excess to any other insurance available to the insured. "Undeniably," the District Court found, "both carriers contemplate a disbursement only at the highest (*i.e.* last) level of coverage and have attempted, by way of their similar phraseology, to render their coverage excess to

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* U.S. Fire defined the "retained limit" as consisting of all primary or underlying insurance listed in the policy, as well as any other insurance collectible by the insured. Similarly, Federal defined the "retained limit" as consisting of the insurance listed in its policy or any other insurance collectible by the insured, whichever is greater. [A-27].

all others." [A-29]. However, neither of the "virtually identical 'other insurance' clauses" contained any language "making its carrier, *i.e.*, plaintiff or defendant, excess over *all other excess* insurers covering the same risk (emphasis in original)" [A-29], though either could have done so. Accordingly, the District Court found that these mutually exclusive "Other Insurance" clauses cancelled each other out and directed the parties to contribute ratably to the settlement in proportion to their policy limits.

In the face of this unassailable similarity between the policies, U.S. Fire itself resorted to an extrinsic fact by attempting to single out one isolated phrase from the introductory message preceding the Federal policy. This phrase stated to the policyholder (not U.S. Fire) that it applied "after all your primary liability insurance has been used up" [A-27, 28]. On the basis of this introductory phrase preceding the actual policy, U.S. Fire argued that the Federal policy was intended to insure at a lower level. As the District Court correctly found, however, "this language is contained in a general introductory provision of the Federal insurance contract within a subsection entitled "Your Policy and You." Exh. 3 at 3-4. Significantly, defendant's precise coverage responsibilities are more elaborately and technically set forth in the "Policy" section (*Id.* at 5-15) which disclose a consistent intention on the part of Federal to contribute policy proceeds only after primary *and* other insurance has been exhausted." [A-27, 28]. Because the inferences to be drawn from this undisputed record remained in dispute, the Second Circuit applied the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) and affirmed the decision below.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

This case presented a narrow question of state insurance law that has no important ramifications for the insurance industry at large or the Federal Rules of Civil Procedure. The decision turned on a comparison of the language, purpose, and premium structure of two insurance policies. Under ordinary principles of collateral estoppel both parties already know how a court will construe their policies in the future and further review or clarification by this Court is unnecessary. Any conflict between these policies and another insurance policy would have to be decided on the specific facts presented regardless of whether the result below is characterized as a question of fact or a question of law.

Nor is there any division or confusion among the Circuits as a result of this Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). While the Circuits have employed differing standards of review in a series of contract cases, this was the result of the different factual or legal questions presented in the cases themselves. All of the Circuits are in general agreement that the construction of unambiguous contractual language is a question of law as to which review is plenary. Where an ambiguity arises, however, and the parties' intention must be determined, a question of fact arises as to which the District Court's findings will not be reversed unless clearly erroneous under Fed. R. Civ. P. 52(a). In this case U.S. Fire attempted to create such an ambiguity by reaching beyond the text of Federal's policy to argue that a phrase in the introductory section undermined Federal's manifest intention to provide a final level of excess coverage beyond any other available insurance. Not only was the issue resolved squarely against U.S. Fire, but the result was soundly supported by the overall undisputed record below.

I

NO QUESTION OF IMPORTANCE HAS BEEN PRESENTED

In attempting to elevate this routine question of state insurance law into a substantial public question worthy of this Court's consideration, U.S. Fire suggests that itself and the entire insurance industry need to know how a court will construe the policies involved here. This case does not, however, involve the construction of any particular clause or contractual term of art which needs to be clarified for the benefit of the entire insurance industry. Rather, it involves a comparison of two particular policies to determine whether one was intended to be excess to the other.

It is disingenuous for U.S. Fire to claim that it merely seeks clarity, because the clarity U.S. Fire purports to seek is already supplied by the decision below. The Court's opinion, finding that the Federal and U.S. Fire policies cover the same risk at the same level and thereby cancel each other out, would have collateral estoppel effect in any future litigation involving a conflict between the same two policies. Because U.S. Fire and Federal already know "how a court will construe their policies" (U.S. Fire Brief at p. 11) in a future conflict between them, further elaboration is unnecessary.

Nor would characterization of this result as a pure question of law have provided any additional guidance for the entire insurance industry. The ranking of two excess insurance policies will necessarily vary depending on the respective provisions of the two policies, the language used, their premium structures, the risks covered, and whether either policy is identified by the other as being primary or underlying to it. Any dispute between a third insurer and either U.S. Fire or Federal would have to be resolved anew on its own facts, and treating the holding below as a question of law rather than fact will do little if anything to alleviate future litigation where different policies, with their own wording and structure, are involved.

II

THE CIRCUITS ARE NOT DIVIDED

U.S. Fire also attempts to elevate this into a major issue of civil procedure by arguing that this Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) has unleashed a wave of division among the Circuits over the correct standard of review to be applied in appeals involving contract questions. Upon closer examination, however, the "division" proves to be nonexistent. The plethora of cases cited by U.S. Fire involved a widely disparate variety of factual or legal questions which warranted different standards of review based upon the different issues presented, not any confusion among the circuits.

In *RCI Northeast Services Div. v. Boston Edison Co.*, 822 F.2d 199 (lst Cir. 1987), the First Circuit did not hold that all questions of contract construction are matters of fact to be submitted to the finder. Only where there is an ambiguity to be resolved does a finding of fact become necessary, as the Court's holding makes clear:

> . . . where the plain meaning of a contract does not spring unambiguously from the page or from the context, its proper direction becomes one for the factfinder, who must ferret out the intent of the parties.

822 F.2d at 202. Similarly, in *Republic Resources Corporation v. ISI Petroleum West Caddo Drilling Program 1981*, 836 F.2d 462, 465 (10th Cir. 1987), the Tenth Circuit only applied the "clearly erroneous" standard after determining that an ambiguity existed necessitating an inquiry into the parties' intentions.

While U.S. Fire purports to find a conflict between the foregoing positions and that taken by the Fifth Circuit in *Godchaux v. Conveying Techniques Inc.*, 846 F.2d 306 (5th Cir. 1988), the conflict subsides upon a reading of *Godchaux*. In that case, the Fifth Circuit applied the "clearly erroneous" standard of Rule 52(a) in reviewing the district court's construction of the phrase "generally accepted accounting principles consistently applied" as they appeared in a warranty portion of a contract. In opting

for such a standard of review the Fifth Circuit formulated the applicable test as follows:

> Since the interpretation of a contract is a matter of law if the provisions of the contract are clear, we will review the district court's interpretation of this contract de novo if we determine that the terms of Godchaux's warranty are clear and unambiguous. . . . If, however, we determine that the terms of Godchaux's warranty are ambiguous after we search the four corners of the contract, then we will accept, unless clearly erroneous, the district court's findings of fact as to the intent of the parties. Fed. R. Civ. P. 52(a). (Citations omitted).

This is not inconsistent with the position of the Third Circuit, as expressed in *STV Engineering Inc. v. Greiner Engineering, Inc.*, 861 F.2d 784, 787 (3d Cir. 1988):

> To the extent, however, that the district judge's decision involves the construction of a clear contractual term, or the application of that construction, our review is plenary. [Citation omitted]. While the interpretation of an ambiguous contractual term is a matter for the factfinder, determining whether contractual terms are clear or ambiguous is a matter of law . . .

None of the other cases cited by U.S. Fire espouse a different rule. In sum, the Circuits are generally in agreement that the construction of clear and unambiguous contractual language is a question of law as to which review is plenary. Where an ambiguity exists, however, then a question of fact arises as to which the "clearly erroneous" standard applies.

In this case U.S. Fire labored to create an ambiguity by arguing that an isolated phrase in the introductory message – which was itself extrinsic to the actual policy – contradicted the unmistakable intent of the Federal policy to apply only after all other excess insurance had been exhausted. Having reached beyond the body of the policy in an effort to create an ambiguity, U.S. Fire can hardly be heard to complain that the Court's findings with respect to that purported ambiguity were reviewed under the "clearly erroneous" standard.

III

THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW AND THE RESULT IS CLEARLY SUPPORTED BY THE RECORD BELOW

Finally, the Second Circuit applied the correct standard of review to this case. This did not involve the construction of any unambiguous phrase or term of art, but a ranking of two separate policies – each extrinsic to the other – to determine whether the different parties "bargain[ed] for a ratable contribution with" the other. *Lumbermens Mutual Casualty Company v. Allstate Insurance Company*, 51 N.Y.2d 651, 435 N.Y.S.2d 935, 955, 417 N.E.2d 66 (1980). Because U.S. Fire attempted to create an ambiguity by reaching beyond the Federal policy to an allegedly inconsistent phrase contained in its extrinsic introductory message, this case is inapposite from such prior decisions of this Court as *Hamilton v. Liverpool & London & Glove Ins. Co.*, 136 U.S. 242, 255 (1980), which involved the interpretation of unambiguous commercial writings whose meaning was not in dispute.

Moreover, the result below was amply supported by additional evidence in the record. First, the very circumstances under which the policies were purchased negates U.S. Fire's argument that the parties or their policyholders intended one policy to be excess to the other. The Federal policy was purchased by John Bell individually, to provide excess insurance over and above, *inter alia*, his wife's personal automobile insurance policy. The U.S. Fire policy, by contrast, was purchased by the Boyle Company (of which John Bell was president) to provide excess coverage over and above, *inter alia*, a business automobile policy issued by Federal to the Boyle Company. Since these policies were purchased by separate policyholders, both to provide a second layer of coverage to their own insurance schemes, it would have been absurd to hold that Mr. Bell intended his personal excess policy to provide a lower level of coverage to the Boyle Company corporate policy, and the decision below was manifestly correct.

Second, U.S. Fire itself conceded that the policies were to apply concurrently in the proceedings below. In attempting to induce

Federal's participation in the settlement of the underlying action, U.S. Fire's trial witness Dan Miller had furnished an opinion (which was admitted into evidence without objection by U.S. Fire) from his present counsel's law firm to that effect that the policies applied concurrently. Hence any doubts on this issue had been resolved by U.S. Fire's own admission that the two policies applied concurrently. While it was not necessary for the District Court to specifically incorporate these additional facts into its opinion given the manifest overlap and similarity between the policies, they further establish the correctness of the result below and obviate any need for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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